United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7030

To be Argued by
TALLMAN BISSELL

United States Court of Appeals
FOR THE SECOND CIRCUIT

METROPOLITAN WORLD TANKER CORP.,
as chartered owner of the M/T MANTINIA,

and

METROPOLITAN MARINE TRANSPORT CORP.,
as owner of the M/T MESOLOGI,

and

METROPOLITAN NAVIGATION CORP.,
as owner of the M/T MONEMVASIA,

and

METROPOLITAN SEAS TRANSPORT CORP.,
as owner of the S/T METHONI,

Plaintiffs-Appellants,

against

P. N. PERTAMBANGAN MINJAK DAN GAS BUMI NASIONAL (P. N. PERTAMINA),

and

PERUSAHAAN PERTAMBANGAN MINJAK DAN GAS BUMI NEGARA (PERTAMINA),

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

HILL, BETTS & NASH
Attorneys for Plaintiffs-Appellants
One World Trade Center
Suite 5215
New York, New York 10048
(212) 466-4900

ELI ELLIS
TALLMAN BISSELL
FRANCIS H. McNAMARA
Of Counsel

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Docket No. 76-7030

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and

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BRIEF FOR APPELLANTS

Preliminary Statement

Plaintiffs appeal from an order of the United States District Court for the Southern District of New York insofar as it vacated an order of attachment of properties belong-

ing to defendants, granted on December 5, 1975. The opinion below of the Hon. Constance Baker Motley has not been reported.

Issue Presented for Review

The sole question presented by this appeal is whether the provisions of Title 9, U.S.C.A., the Federal Arbitration Act, invalidate the attachment obtained by the plaintiffs as security for their claims.

Statement of the Case

Plaintiffs, the owners of four vessels chartered to defendants, brought suit in the United States District Court for the Southern District of New York, alleging damages for non-payment of hire under the respective charter parties and asking that the proceedings be stayed pending arbitration, in accordance with arbitration clauses contained in each of said charter parties. (A6 et seq.)

Thereafter, in order to obtain security for their claims, plaintiffs sought and obtained an order of attachment pursuant to Rule 64 of the Federal Rules of Civil Procedure and Sect. 6201(1) of the Civil Practice Law and Rules of the State of New York. (A59) The order provided that a hearing be held within three days after levy so as to comply with the court's decision in *Sugar* v. *Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974), i.e., to afford defendants an immediate opportunity to contest plaintiffs' right to the attachment. (A63)

After this hearing the Trial Court in an opinion dictated from the bench held that the attachment should be vacated as violative of Title 9, U.S.C.A. and that the parties should proceed to arbitration as per their agreements. (A134-139) An order to this effect was signed on January 9, 1976 (A142), and this appeal is taken from so much of that order as vacated the attachment.

Statement of Facts

There is no substantial dispute on the facts. The plaintiffs are four Liberian corporations, each owning one of the four vessels here involved. The defendants are corporations or state-owned entities of Indonesia, collectively known as Pertamina, with an office at 866 United Nations Plaza, New York, New York, within the jurisdiction of the Court below.

Each of the four vessels was chartered to Pertamina for hire, which in varying amounts has not been paid. The total in arrears at the commencement of these proceedings was in excess of $7,397,000. (A95)

Each of the four charter parties contained a valid arbitration clause. (A21, 30, 42, 57) This action was commenced seeking arbitration of plaintiffs' claims and security therefor.

POINT I

The Attachment Granted Pursuant to Rule 64 of FRCP and Sect. 6201(1) of CPLR Was Proper.

Rule 1, FRCP, reads as follows:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action."

Consequently, this suit although within the admiralty jurisdiction of the court, is subject to all the Rules (the exceptions in Rule 81 are not relevant here), including Rule 64 which provides as follows:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person

> or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

It is appellants' position, as argued in detail *infra*, that no existing statute of the United States is applicable to deny resort to Rule 64, and hence to Sect. 6201(1) of the Civil Practice Law and Rules of the State of New York.

That Section provides in part as follows:

> *"Grounds for Attachment"*
>
> "An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part or in the alternative, to a money judgment against one or more defendants, when (1) the defendant is a foreign corporation or not a resident or domiciliary of the state; . . ."

Obviously, this is not a matrimonial action, and it is not contested that defendants are foreign corporations. On the basis of the foregoing, the plaintiffs' motion for an attach-

ment was granted originally by the court below. After a hearing, however, the court vacated the attachment on the ground that it was prohibited by Title 9, Chapter 2, U.S.C.A. (A 137-139).

POINT II

Nothing in Title 9, Chapter 2, U.S.C.A. Prohibits Prearbitration Attachments.

The principal ground on which Judge Motley vacated the attachment was that it was not permitted under Title 9, U.S.C.A. Sect. 201 et seq., which are the enabling legislation for United States adherence to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (A134-139).

Appellants do not dispute that the arbitration agreements in this case fall within the terms of the Convention as enacted, namely a commercial relationship, and more specifically, a written provision in a maritime transaction as provided in Sect. 2 of Title 9. However, the Convention is silent as to provisional remedies invoked in aid of arbitration, and appellants strongly submit that it was never the intent of the framers of the Convention to exclude or prohibit such remedies (see Point IV *infra*).

The applicable provisions of the Convention are found in Article II (3) thereof, as follows:

> "The court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

This section simply requires that an arbitration clause be enforced and disputes thereunder be decided by arbitra-

tors. Nothing more; attachment and other compulsive measures to obtain security are not in the province of the arbitrators. But the court, seized of an action, has that very function, and can restrain, enjoin, sequester or attach, as the case under local practice may be, before or simultaneously with or even after the referral to arbitration (see Point IV *infra*).

In holding that the court does not have such powers, the District Judge relied on *McCreary Tire & Rubber Co.* v. *CEAT S.p.A.* 501 F. 2d 1032 (3rd Cir. 1974). (A 138) In that case McCreary started an action in the Pennsylvania State Court by a "Praecipe for Writ of Foreign Attachment" for breach of a contract containing an International Chamber of Commerce arbitration clause. After removal, the defendant moved to dissolve the writ, to dismiss the complaint, to transfer the case to another district and to stay the case pending arbitration. All motions were denied. On appeal, the Third Circuit reversed, holding, among other things, that resort to the writ of attachment was a violation of McCreary's agreement to submit to arbitration, and that the Convention obliged the district court to recognize and enforce the agreement to arbitrate. The Court said that commencing an action by attachment was an attempt to bypass the agreed method of settling disputes, and that such a bypass is prohibited by the Convention (p. 1038). It went on to state:

> "The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate." (p. 1038)

No authority was cited for this proposition.

Appellants submit that *McCreary* is erroneous in several respects.

In the first place, the attachment in the Pennsylvania court is not a "suit", although the Praecipe does contain what appears to be a form of summons, and is issued before the complaint is filed. (Rule 1356 Penna. Rules

Civ. Proc.) The point is irrelevant to the case at bar in any event, since the attachment under CPLR 6201 is most certainly not a "suit". The Section commences:

> "An order of attachment may be granted *in any action* . . ." (emphasis supplied)

In New York, the action is not commenced by the attachment but by the service of a summons and complaint. (CPLR 304)

Secondly, *McCreary* followed through to its logical conclusion would nullify *all* remedies provided by Title 9, U.S.C.A. Section 8 of Title 9 provides that if there is admiralty jurisdiction, the aggrieved party may begin his proceeding by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings. This Section is irreconcilable with the *McCreary* analysis of Article II (3) of the Convention, which must either outlaw all actions and attachments or none. This is made all the more clear by Section 208 Title 9 which reads:

> "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

If the Convention prohibits prearbitration attachments or suits, then Sect. 8 is in conflict with it, and must fall. Furthermore, Sect. 3 provides for a *stay of an action* brought on an issue referable to arbitration. If no action at all can be brought in a dispute falling under the Convention, then Sect. 3 is abrogated as well.

That this was not the intent of Congress in enacting Sect. 201 et seq. is made clear in the legislative history, 1970 U.S. Code Congressional and Administrative News, pages 3601-3604. Of particular interest is a letter dated December 3, 1969 from Mr. H. G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, Dep t-

ment of State, to the Speaker of the United States House of Representatives. The letter forwarded draft legislation (which became 9 U.S.C. § 201 et seq.) which would implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and contains valuable comments concerning the purpose of the draft legislation. We quote from the letter, in pertinent part:

> "The Federal Arbitration Act, which has been codified in Title 9 of the United States Code, embodies basic national policy concerning arbitration. The Secretary of State's Advisory Committee on Private International Law, which includes representatives of the American Bar Association, the Conference of Commissioners on Uniform State Laws, suggested that the Department discuss with a small group of representatives of the American Arbitration Association, members of the Arbitration Bar and law school professors, the most effective approach to the implementing legislation. The consensus of the group, with which the Department of Justice concurs, *was that rather than amending a series of sections of the Federal Arbitration Act it would be preferable to enact a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention. This approach would leave unchanged the largely settled interpretation of the Federal Arbitration Act.* Moreover it would avoid complicated interlineations which, while facilitating implementation of the Convention, might also mislead or confuse persons dealing with cases falling under the Federal Arbitration Act but not under the Convention." (emphasis supplied)

The "largely settled interpretation of the Federal Arbitration Act" is, among other things, that since an admiralty writ of foreign attachment is expressly permitted (Sect. 8), civil attachments in non-maritime cases are permitted as well.

This Court has addressed itself to the point in *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 391 (2nd Cir. 1944). There, Judge Learned Hand held that there was no reason why a Court should not sustain both an attachment and an arbitration conducted pursuant to a stay of the action under Title 9, Sec. 3.

The *McCreary* court asserted that *Murray Oil* had been rejected by the Supreme Court in *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198 (1956), but this is a manifest misreading of *Bernhardt*. *Murray Oil* was strictly a construction of the Federal Arbitration Act and allowed an attachment thereunder; *Bernhardt* involved the application of *Erie* v. *Tompkins*, 304 U.S. 64 (1938). In a diversity case, the Court of Appeals had held, following a dictum in *Murray Oil*, that arbitration was merely a form of trial, and hence procedural, so that under the *Erie* doctrine the validity of a New York arbitration clause fell to be determined by the law of New York. The Supreme Court disagreed with that characterization, holding that arbitrability was substantive and therefore to be decided according to the law of the forum state. No question of attachment was considered or involved, and there is no indication that the Supreme Court disagreed with the holding of *Murray Oil;* rather, it disagreed only with application of its dictum, and decided that the right to arbitrate is a substantive rather than a procedural matter. Clearly, such a decision has no relevance whatever to the question of prearbitration attachment.

POINT III

The Court Below Misunderstood the Nature and Purpose of the Complaint.

In their amended complaint, plaintiffs sought a direction by the court that the parties proceed to arbitration, and that the action be stayed pending such arbitration. (A14) Sect. 3 of Title 9 provides that upon the applica-

tion of *one* of the parties the action shall be stayed, providing the applicant for the stay is not in default in proceeding with such arbitration. The suit was commenced to obtain a referral to arbitration, so there was no default, and to obtain a stay, which must be granted under the Section. But plaintiffs also wanted security for their substantial claims. Since Sect. 8 of Title 9 was not available to them, there being no vessel to seize and foreign attachment not lying because of defendants' presence within the district, plaintiffs' only course of action was to utilize Rule 64 and obtain security by way of attachment under CPLR 6201(1). Judge Motley construed Sect. 3 of Title 9 to mean that the stay therein provided was "clearly a remedy intended for a defendant who wants to compel plaintiff to arbitration (sic), and this is set out in the Anaconda decision." (A137)

The District Judge was wrong. Not only does Sect. 3 provide for a stay on the application of *either* party, but the decision referred to, *The Anaconda et al.* v. *American Sugar Refining Co.*, 322 U.S. 42 (1944), not only does not support the court's conclusion, but in fact supports plaintiffs' right to the attachment. In that case it was held that the parties by agreement could not make unavailable the provisions of Sect. 8 relating to seizure and foreign attachments in admiralty causes. The Court also considered Sect. 3, and said at page 44:

> "The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law."

Here, plaintiffs commenced an *in personam* action and sought security as expressly permitted by Rule 64, FRCP. As was said in *Anaconda,* supra, ". . . it is clear that the parties may proceed in an admiralty case without the customary libel and seizure." (p. 45)

POINT IV

The Proper Construction of the Convention.

In *McCreary,* supra, relied on by the court below, it was said that the purpose of the enactment of Title 9, Sect. 201 *et seq.* was to prevent the vagaries of state law from impeding the full implementation of the Convention and that permitting a continued resort to foreign attachment in breach of the agreement to arbitrate is inconsistent with that purpose. This argument assumes its conclusion. Resort to provisional remedies is not a breach of the agreement but is in aid thereof; nor it is a breach of the Convention.

Appellants consider it appropriate to place before the Court a brief summary of the attitudes and practice of other nations adhering to the Convention, as an aid to its interpretation.

American Law Institute, *Restatement of Foreign Relations Law of the United States, 2nd* (1965) Sect. 147(1) lists among the proper criteria for interpretation the following:

> "(f) the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of one party, if the other party or parties knew or had reason to know of it."

1. France.

Robert, *Arbitrage Civil et Commercial,* 4th ed., 1967, states, in Section 139:

> "The case law today definitely lays down that the existence of an arbitration clause does not prevent that the judge sitting in référé [equivalent to Special Term, Part II, New York County, or the motion judge in the Southern District] should be seized in case of urgency . . ."
>
> . . . . . .

> [T]he référé judge having jurisdiction will nevertheless be the civil or commercial judge appropriate to the nature of the matter (civil judge in order to authorize an attachment, commercial judge in order to designate an expert or a temporary receiver, etc.)"

2. Germany (Federal Republic).

The German practice treatise Stein-Jonas, *Kommentar zur Zivilprozessordnung*, 19th ed., 1975, states the rule as follows:

> "[I]f for purposes of the decision upon the merits, jurisdiction of a Court of Arbitration has been agreed upon, the State Court nevertheless has jurisdiction for issuing an arrest. . . . Accordingly, the application for an arrest cannot properly be met by 'plea in abatement that the matter is subject to an arbitration agreement.' "

3. Italy.

Professor Francesco Berlingieri, President of the Comité Maritime International, has stated in a paper presented to the International Congress of Maritime Arbitrators in April-May, 1976, and published or to be published in its proceedings:

> "The arbitrators cannot authorize the arrest of assets of any of the parties upon application of the other party but contrary to what happens in other jurisdictions, the fact that arbitration proceedings are pending does not prevent the parties to apply to the ordinary Court with a view to obtaining the warrant of arrest. In such a case the Court will only decide upon the existence of the conditions required for the granting of the warrant of arrest, the merits being of course within the competence of the arbitrators."

4. England.

Despite the lack of an attachment remedy in English law, its equivalent is achieved by various sanctions available to the plaintiff. Thus, in Russell, *Arbitration,* 18th ed., 1970, it is said at pages 264-265,

> "In addition to its powers to make orders relating to merely procedural matters the court has wide powers to make orders for the purpose of preserving the *status quo* pending arbitration.
>
> These powers include those of making orders for the preservation, interim custody or sale of any goods, the subject matter of the reference, or for the detention or preservation of any property or thing concerned in the reference; of appointing a receiver; and of granting an interim injunction. Quite apart from these express powers, the court has always been willing to assist in this way in proper cases."

As demonstrated above, provisional remedies such as preservation orders, arrest, seizure and injunctions can only be granted by the courts, and the Convention is thus necessarily silent on the matter. Such silence cannot be assumed to forbid such remedies as *McCreary* so plainly does.

Conclusion

For the foregoing reasons, and on the authority of *Murray Oil, supra*, the order of the court below should be vacated insofar as it dissolved the attachment herein and the attachment should be reinstated.

Dated: January 19, 1977
New York, New York

Respectfully submitted,

HILL, BETTS & NASH
Attorneys for Plaintiffs-Appellants
One World Trade Center
Suite 5215
New York, New York 10048
(212) 466-4900

ELI ELLIS
TALLMAN BISSELL
FRANCIS H. MCNAMARA
Of Counsel

Receipt of duplicate copies of the within BRIEF is hereby admitted this 19TH day of JANUARY 1977

Burke & Parsons

Attorneys for APPELLEES